No. 12401

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

FOSTER TRANSFER COMPANY,
a corporation,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION.

HONORABLE JOHN C. BOWEN, *Judge*

REPLY BRIEF OF APPELLANT

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STATEMENT OF CASE

The statement of the case as narrated in the appellee's brief would convey the impression that the appellee was unaware of any unsatisfactory performance of the contract until he received the appellee's notice of cancellation. Such a contention is not borne

out by the record. The two letters of August 28, 1945, and September 26, 1945, (Exhibits A-4 and A-5) transmitted to the appellee by the appellant are replete with references to "delays and unsatisfactory service", "insufficient accessorial equipment", "deficiencies on your part", "criticisms of your service", and hopes that the standard of performance by the appellee would improve. Thus the appellee's inference that the notice of cancellation dated February 20, 1946 was a surprise is without any foundation whatsoever.

REPLY TO APPELLEE'S ARGUMENT ON SPECIFICATION OF ERROR No. 1

The appellee bases its answer to Specification of Error No. 1 upon the contention that the phrase as used in the contract "good and sufficient cause" is ambiguous and uncertain. It is presumed that the appellee is in reality attacking the court's finding of fact that the appellant had good and sufficient cause to cancel the contract, and contends that under the evidence and the law, the court was not justified in making such a finding. There was an abundance of evidence to the effect that the appellee had not faithfully performed the contract and that the appellant acted in good faith in cancelling the contract.

The authorities are in accord that a right to

cancel a contract for "good and sufficient cause" is a right which will be enforced unless there is an absence of good faith on the part of the party exercising such right. Even the authorities cited by the appellee in 12 Am. Jur. support this contention. The quotation set out in the appellee's brief is based upon *Cummer v. Bucks*, 40 Mich. 322. In that case the contract provided, "will also agree that for good cause this agreement shall be cancelled upon sixty days notice by either party." One of the parties cancelled the contract, giving the required sixty days notice. The other party instituted action for recovery of lost profits as in the case at hand. Defendant prevailed in the trial court and in sustaining the trial court, the decision states,

> "The passage in question being ineffective on account of its radical uncertainty, there was nothing to detract from the exercising of the right of revocation as it actually occurred, provided the plaintiff in error acted in good faith. Nothing more was required. On this record, the claim for profits is at least irrelevant."

The following quotation found under Note 43 in 17 C.J.S. on page 889 is supported by many cases and is the law on this subject:

> "*Just cause*" *or* "*good cause*"
>
> "As used in contracts providing for termination of contract by either party for "just cause"

> or "good cause," the quoted phrases are not synonymous with "legal cause" which exists independently of the contract, but include causes outside of legal cause, which must be based on reasonable grounds, and there must be a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power to terminate." (Citing cases.)

The United States Supreme Court has passed upon this question in *Goltra v. Weeks*, 271 U.S. 536, wherein on page 548, the court stated:

> "The cases leave no doubt that such a provision for termination of a contract is valid, unless there is an absence of good faith in the exercise of the judgment. Here, nothing of the kind is shown. Such a stipulation may be a harsh one or an unwise one, but it is valid and binding if entered into. It is often illustrated in government contracts in which the determination of a valid issue under the contract is left to the decision of a government officer. *Kihlberg v. United States*, 97 U.S. 398; *Sweeny v. United States*, 109 U.S. 618; *United States v. Gleason*, 175 U.S. 588; *United States v. Mason & Hanger Co.*, 260 U. S. 323; *United States v. Henley*, 182 Fed. 776; *Martinsburg R. R. Co. v. March*, 114 U.S. 549."

The appellant's Specification of Error No. 1 is directed at the trial court's error in interpreting the words, "at any time" to mean "upon giving reasonable notice". It is interesting to note that the appellee's brief completely fails to answer the appellant's argument on this question. The trial court interpreted "at any time" to mean "upon giving a rea-

sonable notice". The trial court then found that a reasonable notice was not given and allowed the plaintiff a recovery sufficient to place it in a position of status quo.

The appellant contends that in so doing the trial court substituted "upon giving reasonable notice" for the words "at any time". As used in the contract, the words "at any time" refer to the appellant's right to cancel. The term "cancel" is, of course, synonymous with the word "terminate." Since cancel or terminate means to bring to an end, the words "at any time" can have no other meaning than that which is normally implied thereby. It was error for the trial judge to give the words "at any time" a special meaning. The following is quoted from 12 Am. Jur., Contracts, Section 236:

> "*Meaning of Words.* — Words will be given their ordinary meaning when nothing appears to show that they are used in a different sense and no unreasonable or absurd consequences will result from doing so. Words chosen by the contracting parties should not be unnaturally forced beyond their ordinary meaning or given a curious, hidden sense which nothing but the exigency of a hard case and the ingenuity of a trained and acute mind can discover."

A learned discussion of the meaning of the words " at any time" is found in *Haworth v. Hubbard*, 44

N. E. (2d) 967, 144 A.L.R. 881, wherein the court stated:

> "There is language in some of the cases to the effect that where no time for performance is specified in a contract it must be performed within a reasonable time, and that where the contract provides that it is to be performed within a reasonable time the effect is the same as though no time had been mentioned and the words 'within a reasonable time' had been omitted. To say therefore that 'any time' means 'within a reasonable time' is to say that the words 'any time' are to be given no effect whatever. Such a construction violates the fundamental rule which requires that all of the words in a contract be considered in determining its meaning."

In *Magee v. Scott & Holston Lumber Co.*, 80 N.W. 781, 78 Minn. 11, the parties had entered into a written contract which provided in part, "It is furthermore mutually agreed by the parties hereto that, in case the services performed by the party of the second part shall not be satisfactory, then, and in that event, the party of the first part reserves the privilege of terminating this contract *at any time.*" (Italics ours). The defendant, party of the first part, upon finding that the other party had left the job, hired another to do the work. When the plaintiff, party of the second part, returned three days later, the defendant "promptly notified him the contract was terminated" and that he would no longer

receive or accept his services. The plaintiff brought an action to recover the value of his contract. The trial court directed a verdict in favor of the defendant because there was no showing of a lack of *good faith* on the part of the defendant. The Supreme Court of the State of Minnesota affirmed the trial court.

See also *Ripley v. Lucas*, 255 N.W. 356, 267 Mich. 682, which holds that the court cannot alter or amend contracts by substituting a different method of revocation from that which is stipulated therein.

The end result in the court's substituting the words "within a reasonable time" for the words as actually used in the contract, "at any time", was to hold the appellant liable for restoring the appellee to a status quo. If such had been the intention of the parties, a provision to that effect would have been inserted in the contract. There being no such provision in the contract, the court erred in forcing such an interpretation. The law on this question is tersely stated in 17 C.J.S., Contracts, Section 401, at page 891, "Unless the contract so provides, the status quo of the parties need not be restored on its termination."

Attention is called to the nature of this contract. The appellee was to perform such drayage

services as required by the Procurement Division of the Department of the Treasury and for such other Government agencies who desired to use their services under the contract. As such services were performed, the same were paid for by the appellant. The effect of the cancellation was not to deprive the appellee of compensation for services already performed, but only terminated the appellee's right to perform for the Procurement Division after the effective date of the termination. By Special Condition No. 21, the appellant reserved the right to terminate if the services of the appellee were unsatisfactory. In other words, the appellant did not intend to be bound to continue to use the appellee's services if the appellee did not furnish satisfactory services. No other interpretation can be placed upon the provisions of Special Condition No. 21. Such a provision is not contrary to any public policy. Without the right to so terminate the contract, there would be no incentive for the appellee to faithfully perform. The obvious purpose of Provision No. 21 was to give the appellant the right to insist upon prompt and satisfactory service from the appellee and unless the appellee did perform satisfactorily, the appellant could cancel the contract. The appellee has no legal or equitable claim for restoration to a status quo when the cancellation

was occasioned solely because of his gross unsatisfactory performance.

If the appellant were required to postpone the effective date for termination of the contract for a month or longer, as the trial judge inferred it should, then the Procurement Division is forced to continue to accept the appellee's unsatisfactory service for a month or defer its need for drayage for that period. So long as the contract remained in force, the Procurement Division was bound to use the appellee's services in its business. However, the appellant was not required under the contract to give the appellee any work whatsoever. Had the appellant given a month's notice and refrained from having any drayage done during that time, the appellee would still have had his expenses but no compensation. It is obvious therefore the court injected provisions in the contract requiring restitution which were never intended.

REPLY TO APPELLEE'S ARGUMENT ON SPECIFICATIONS OF ERROR NOS. 2 AND 3.

In answer to the appellant's argument on Specifications of Error Nos. 2 and 3, the appellee relies upon the appellant's failure to object to the court's interrogation of the witness, Doolittle, on the question of special damages. Few lawyers will dispute

the contention that it is a tactless practice, to say the least, to object to questions propounded by a trial judge. The form of the questions propounded by the trial judge was not such as would clearly indicate that the trial judge was seeking to establish evidence on special damages. The information sought by the trial judge could very well have been used as a method for arriving at the anticipated profits which the appellee might have received if the contract had not been cancelled. Therefore, no objection was indicated at the time and the appellant's rights should not be prejudiced by failure to so object.

If the appellee seeks to rely upon a failure to object, then the appellant is entitled likewise to rely upon the fact that the appellee did not move to amend his pleadings to cover special damages. If such a request had been made and the appellant had not objected at that time, then there might be some merit in the appellee's contention. Since no such motion was made, the appellant could not object thereto.

REPLY TO APPELLEE'S ARGUMENT ON APPELLANT'S SPECIFICATION OF ERROR No. 4.

In answering appellant's argument on Specification of Error No. 4, the appellee contends that the dispute between the parties is predicated upon a question of law. The appeal made by the appellee to the

Secretary of the Treasury clearly shows that the dispute as presented in that appeal was whether or not the appellant had good and sufficient cause to cancel the contract, in other words, a question of fact. The appeal makes no claim that the notice was unreasonable nor does it request restoration to a status quo. The Secretary of the Treasury found there was good and sufficient cause for the cancellation of the contract. The trial judge did likewise. General Provision 3 of the contract provides that the decision of the Secretary of the Treasury "shall be final and conclusive upon the parties."

The question as to the reasonableness of the notice of cancellation was not raised in the appeal to the Secretary of the Treasury. In fact, the only instance where that question has been raised is in the decision of the trial judge. Nowhere in the pleadings or in the evidence as adduced by the parties at the trial was the question raised as to the reasonableness of time allowed within which the contract was to be terminated.

The appellee having submitted his dispute to the Secretary of the Treasury, is bound by the decision of that officer and has no right to bring this action.

CONCLUSION

The trial judge heard the evidence and decided that the appellant had good and sufficient cause to cancel the contract. The trial judge erred in giving a special meaning to the words "at any time" and as a result thereof, holding the appellant liable to restore the appellee to a position of status quo. The trial judge erroneously interrogated the witness upon issues not covered by the pleadings and allowed his recovery thereon when there was no motion or request on behalf of the appellee to amend the pleadings to cover such special damages. The appellee having submitted his dispute to the Secretary of the Treasury, and having received an adverse decision on such appeal, is bound by that decision and has no right to bring this action.

Respectfully submitted,

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